

identifying data deleted to
clearly unwarranted
invasion of personal privacy

PUBLIC COPY



U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

B5

FILE:

Office: TEXAS SERVICE CENTER

Date:

JUN 25 2009

SRC 07 232 51532

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a faculty associate at the University of Texas Southwestern Medical Center (UTSWMC), Dallas. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and additional exhibits.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term “prospective” is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on July 27, 2007. In an introductory statement, counsel asserted that the petitioner “is a truly extraordinary nuclear physicist. He has over 25 years of broad experience as a nuclear physicist, seven year[s] of which [were devoted] toward the advancement of medical imaging.”

Seven witness letters accompanied the initial filing. [REDACTED], now a Research Scientist at Rice University, Houston, Texas, stated:

I met [the petitioner] in 1997, when I joined . . . the Compact Muon Solenoid (CMS) collaboration. The CMS is a large international project in high energy physics currently under construction at CERN [the European Organization for Nuclear Research, Geneva, Switzerland]. The ultimate goal of this experiment is to prove the existence of Higgs boson, which is critical for understanding why certain fundamental particles have mass. The collaboration involves more than 1600 scientists and engineers from approximately 150 institutions worldwide.

At this time, [the petitioner] was one of [the] key members of the CMS group from the Joint Institute for Nuclear Research (JINR) in Dubna, Russia. The group was working on the design and development of the inner cathode strip chambers that are the most critical detectors of the muon system at CMS. . . . Experience in this area of electronics, both the conceptual design and its successful implementation, exists in very few places in the world.

. . . I can confirm that [the petitioner] has a strong background not only in electrical engineering . . . but in experimental physics in general. . . .

[The petitioner] made a significant contribution to the CMS project while working at JINR. He designed and commissioned electronic devices for precise measurements of the muon position and momentum using the detectors built by the JINR group. Currently the production and testing of the cathode strip chambers and associated electronics is close to completion. They will be installed at CERN in the near future and the experiment is scheduled to start operation in 2007.

. . . [The petitioner] joined UT Southwestern Medical Center at Dallas in February 2000. . . . [H]e . . . quickly became a leading electronics expert in the Department of Radiology, where he is focused on advanced radiology and nuclear imaging, mainly on PET(Positron Emission Tomography)/SPECT(Single Photon Emission Computer Tomography) techniques. The initial results of his research have been published recently and look very promising.

[REDACTED] a Researcher at the University of Glasgow, Scotland, stated:

I have known [the petitioner] for more than 20 years, first meeting him at the JINR at Dubna. At that time he was working on a novel and challenging method of acceleration of heavy ions, studying behaviour of cooling helium at extremely low temperatures. His world-class experiments were crucial for the progress of the whole team of several hundred physicists and engineers. . . .

[The petitioner] was one of the key members of the CMS group from JINR. . . .

He also made a crucial contribution to the successful completion of the radiation hardness tests of the LHC [Large Hadron Collider] electronics and materials. . . .

His unique expertise both in nuclear physics and electronics allows him to play a leading role in the Department of Radiology as an expert in the area of nuclear medical imaging.

[REDACTED], Director of the Advanced Radiological Sciences (ARS) Division at UTSWMC, stated:

[The petitioner] joined the ARS Division in February 2000. . . . For the past seven years, I have worked closely with [the petitioner]. . . . [The petitioner] has brought new expertise to the ARS Division, and has been very successful. [The petitioner] plays a key role in several significant research projects involving the design of novel instrumentation for PET, SPECT and BLI (bioluminescence imaging). . . .

[The petitioner] demonstrates a broad knowledge of nuclear particle detection and nuclear electronics that ha[s] been instrumental in advancing diagnostic imaging modalities.

[REDACTED] stated:

[The petitioner] has successfully designed and implemented circuits, networks and data capturing and processing concepts. He has made fundamental and vital contributions to the development of novel biochemical imaging instruments in our laboratory. . . .

Since joining the Department of Radiology in 2000, [the petitioner's] research interests have moved beyond nuclear imaging. He actively works in the area of designing new detectors and methods for bioluminescence imaging.

UTSWMC [REDACTED] stated:

I have followed [the petitioner's] work for more than 20 years. [The petitioner] conducts advanced research of high-speed electronics for nuclear detectors and data acquisition systems, which has been well-recognized and widely used. . . .

[The petitioner has] significantly improve[d] the sensitivity of the small animal PET imager. His groundbreaking results have been widely used in experiments toward developing new positron active agents for early cancer diagnostics. . . .

He is a key researcher in the new project to create a multimodal system for high-contrast CT and high spatial and temporal resolution SPECT for digital mammography, based on Gaseous Electron Multiplier (GEM) structure. The goal of this project is to create [a] non expensive portable device for very early stage breast cancer diagnostics.

UTSWMC [REDACTED] stated: "Much of [the petitioner's] work has been on improvements in Single Photon Emission Computed Tomography (SPECT), an imaging technique of great value in clinical practice and in research for studies in brain, cardiac and cancer. . . . [H]is expertise is very valuable to the ongoing development of SPECT."

[REDACTED] of Johannes Gutenberg University, Mainz, Germany, stated:

I have followed [the petitioner's] research over the last few years as we have a very important common research goal.

. . . [The petitioner's] current and past research and development of novel devices for molecular imaging such as Positron Emission Tomography (PET) imaging and small animal Single Photon Emission Computerized Tomography (SPECT) imaging have been recognized internationally. . . .

I feel that [the petitioner's] research has had a significant impact in the field of nuclear medical imaging. [The petitioner's] research focus sets him apart from others in the field, as it is highly original.

[REDACTED] did not elaborate as to how the petitioner's work differs from the work of others in the field, or provide any details about the petitioner's "significant impact." While [REDACTED] did not mention any active collaboration with the petitioner, the record identifies several articles that list him and the petitioner as co-authors.

The petitioner submits copies of several dozen of his published articles, some relating to his present medical imaging work, others relating to his earlier research in particle physics. To establish the impact of these published works, the petitioner submitted printouts from the Google Scholar database (<http://scholar.google.com>) showing that six of his articles have been cited one to six times each (usually three times or less). The petitioner submitted copies of two articles containing independent citations to his work. The petitioner also submitted a partial copy of a doctoral dissertation by one of the petitioner's German collaborators. An article by Russian researchers contains no citations to the petitioner's work, but the petitioner is one of several individuals thanked in the "Acknowledgments" section at the end of the article.

On January 18, 2008, the director requested further details and evidence to show the nature and extent of the petitioner's impact on his current field. In response, the petitioner submitted a letter from [REDACTED], Director of Medical Physics at the University of Nebraska Medical Center, Omaha, who stated:

I do not know [the petitioner] personally but through my review of his publications and documented accomplishments in the field. [The petitioner] is an extraordinary research scientist in the field of biomedical instrumentation. . . .

[The petitioner] has contributed a number of seminal publications in the area of experimental high energy physics.

Because of his expertise in instrumentation, [the petitioner] was subsequently recruited to the University of Texas Southwestern Medical Center to direct groundbreaking efforts in medical imaging. His work has been pivotal to the development of several small animal imaging devices, including single photon emission computerized tomography (SPECT) and positron emission tomography (PET) scanners. The devices, among the first in the world of their kind, have revolutionized molecular imaging application[s] in both the clinical and pre-clinical setting. These landmark efforts have led to fundamental understanding of the basic mechanisms of many human diseases. . . .

[The petitioner] has made significant scientific advances to our knowledge of this specialized field and his work has had a tremendous impact on the way that scientists approach related studies throughout the United States and abroad.

letter provides no more details about the nature of the petitioner's contributions than did the previous letters. Like the prior witnesses, Prof. Solberg simply asserted that the petitioner made important but unspecified contributions to SPECT and PET technology.

An electronic mail message from [REDACTED] to counsel reads:

[The petitioner's] area of expertise lays mostly in the design and development of tools framework [sic] for nuclear imaging but not in biochemistry or biology. [The petitioner] played a pivotal role in our research endeavors in that he created and modified the small animal PET imager that provided the foundation for our research.

There is no question that without his device and expertise, this research would not have been possible. . . . It would be highly unusual for him to be listed as a first author on any paper resulting from his device, however, the lack of his first authorship on these papers in no way minimizes his substantial contributions [to] the field in creating and modifying as needed his innovative small animal PET imager.

In an electronic mail message to the petitioner, UTSWMC [REDACTED] stated: "I am sure you will be pleased to learn that the small animal PET, which you develop [sic] and support over the past years was used to achieve some important data for a significant paper just published in *Clinical Cancer Research*." The petitioner was not a co-author of the *Clinical Cancer Research* article, but the article includes a citation to a 2006 article by the petitioner which, in turn, announced the construction and testing of a small animal PET imager.

An anonymously-prepared table listed the small animal PET scanner and other devices such as a “Multi head bioluminescence imager.” It is not clear whether the petitioner invented these devices, or simply modified them to meet specific project needs.

An updated citation printout shows an increase of two citations since the preparation of the previous list.

The director denied the petition on September 8, 2008. The director stated: “A check of the citation index Google Scholar indicates you have had only two professionally published articles cited by other scholars in your field.” We note that many of the petitioner’s published articles appeared with a different transliteration of the petitioner’s surname. Therefore, a search for one variant of the surname will not yield any results published under the other variant.

The director also indicated that the petitioner’s most significant achievements with PET and SPECT imaging apparently took place after the petition’s filing date, because the first round of letters indicated only that this research was “promising.” The beneficiary of an immigrant visa petition must be eligible at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Therefore, we must judge the petitioner’s achievements as of the filing date. Later accomplishments cannot cause the petitioner to be eligible if he was not already eligible at the time he filed the petition.

On appeal, the petitioner submits recent articles and related materials. Counsel asserts that, although these materials originated after the filing date, they reflect “the impact of pre-filing work carried out by” the petitioner. Counsel is correct that these exhibits have weight insofar as they reflect the continuing impact of what the petitioner accomplished before he filed the petition. The articles were published by UTSWMC researchers with, in some cases, collaborators at other institutions.

Counsel also states:

[The classification sought] does not require a specific type of documentation (i.e. publications or citations) to demonstrate . . . significant and substantial impact to the national interest. The supporting documentation established that [the petitioner] developed first of its kind PET and SPECT imaging technology that enables physicians and biomedical researchers to more rapidly detect cancer and other deadly diseases in their infancy stages. He continually advances this technology for the needs of front line physicians and researchers in their quests to discover early detection methods of disease.

Counsel is correct that citations alone are not a universal, mandatory qualifying factor for the national interest waiver. Aliens with few or no citations can qualify for the waiver using other evidence, and a heavily-cited alien may be unable to overcome other serious disqualifying factors. Nevertheless, whatever types of evidence a given petitioner submits, that evidence must show that the alien has and will continue to benefit the United States (beyond the intrinsic merit in the alien’s occupation) to such a degree that it is in the national interest to waive the job offer requirement.

Here, it is clear that the petitioner himself does not conduct medical research as such, which is why he is unlikely to receive principal author credit on medical research articles. Therefore, his contributions do not rest in the actual medical research performed at UTSWMC and reported in various journals. Instead, the record demonstrates that the petitioner has performed significant work on various imaging devices used in medical research. The petitioner has not, however, sufficiently established the importance or scope of that work. For example, the record does not indicate that the petitioner or UTSWMC have sought to patent the devices in question. Therefore, we cannot tell if the petitioner's work involved the creation of entirely new devices, substantial modifications on earlier models, or simple fine-tuning for specific, limited purposes.

If the petitioner has invented important new laboratory equipment, or made significant improvements to existing devices, and the petitioner's innovations are now in widespread use, then one could make a persuasive case for a national interest waiver. It is more difficult to say the same if the petitioner's work focuses on modifying equipment in use at one laboratory. Here, the record does not show that other institutions have begun using the petitioner's devices (or adapted their equipment to the petitioner's specifications). Nearly all of the witnesses have been the petitioner's own collaborators, the one exception having described the petitioner's work very broadly, with little helpful detail. The record does not establish widespread use of the petitioner's innovations outside the University of Texas. Evidence of widespread use of PET and SPECT imaging cannot suffice in this regard, as there is no evidence that the petitioner invented those technologies.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.